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IN THE

SUPREME COURT

United States

October Term, 1957

In the matter of
AQUA HOTEL CORPORATION, (in re-organization),
Bankrupt.

PETITION FOR WRIT OF CERTIORARI

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TOPICAL INDEX

	Page
Jurisdiction	2
Statement of the Case	2
Questions Presented	9
Reasons for Granting Writ	12
Appendix A—Opinion	App. 1

TABLE OF CASES AND AUTHORITIES CITED

Cases

Continental-Illinois National Bank & Trust Co. v. Ehrhart, 127 Fed. (2d) 341 15

Kelley v. Everglades Drainage District, 319 U.S. 415 15

Powell v. Alabama, 287 U.S. 68, 77 L. Ed. 170 16

Authorities

Bankruptcy Act, Chapter X 2, 3, 13

Bankruptcy Act, Sec. 24, (11 U.S.C. sec. 47 (c)) 2

Bankruptcy Act, Section 25 (11 U.S.C. Sec. 48) 2

Bankruptcy Act, Section 250 (11 U.S.C.A. Sec. 650) 7, 11

Fifth Amendment to the Constitution of the United States 14, 16

Rules of Civil Procedure, Rule 52 ..... 6, 10

Title 28 U.S. Code, Section 2101 and Section 1254(1) 2

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners, Patricia Springer and John Cashen, creditors, and the Aqua Hotel Corporation in re-organization, respectfully petition this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit and in respect thereto set forth as follows:

JURISDICTION

Jurisdiction is conferred by Title 28 U. S. Code, Section 2101 and Section 1254(1) and by Sections 24 (c) of the Bankruptcy Act (11 U.S.C. Sec. 47(c)) and Sec. 25 (11 U.S.C. Sec. 48) Bankruptcy Act. The decision of the court of appeals was rendered December 17, 1957. Petition for re-hearing was duly filed in that court on January 16, 1958 and denied by that court on January 28, 1958. (Opinion below.)

The opinion for the Court of Appeals for the Ninth Circuit is in the appendix to this petition.

STATEMENT OF THE CASE

The Aqua Hotel Corporation was hit by the Nevada depression in Las Vegas in 1956. The brand new hotel located on the famous Las Vegas strip between the Golden Nugget and the Sands Hotel consisting of approximately 4½ acres of choice property was constructed in 1955. Its stock structure consisted of 250,000 Class A shares of stock, of which 112,500 were owned by Patricia Springer and 112,500 by John Cashen, the petitioners herein, and the balance of 5,000 shares were in the possession of their attorney.

On February 14, 1956 the petitioners filed a petition under Chapter X of the Bankruptcy Act setting forth that it was engaged in operating a 62 room hotel with dining room and cocktail lounge facilities at 1401 S. 5th Street, Las Vegas, Nevada. The petition of the

corporation alleged that it was unable to pay its debts as they matured and proposed re-organization under Chapter X of the Bankruptcy Act of its affairs as set forth in the proposed plan of re-organization (R. 1).

It estimated its grand total of indebtedness at $456,022.79 (R. 9); its assets it listed at $603,537.24. Its total net income for six months prior thereto was listed at $47,807.94 (R.10). It set forth that upon re-organization that its estimated profits from food operations could be $368,000 gross and a net of $83,250 and that it had a potential slot-machine profit of $40,000. (R. 13). Without the slot-machines it estimated its profits to be $149,500.

The proposed plan provided the right to submit a modification of it for approval of the creditors before being submitted for confirmation in the event that the debtor was able to re-finance a fixed or long term obligation.

Thomas J. McGlaughlin was appointed as Trustee (R. 17).

The Court gave to May 11, 1956 to submit a plan or a report why a plan cannot be effected (R. 22). The Trustee proposed no new plan and thereupon upon the extended hearings the creditors and petitioners herein who are the principal owners of the stock of the corporation proposed a plan of re-organization in which it was proposed to issue 500,000 shares of additional stock with an application and a right to sell the same at $1.00 a share and Class B stock likewise to be re-

deemable (R. 31). There were notes payable to the officers of the corporation in the amount of $160,022.79.

In the course of the proceedings, the Trustee kept the hotel opened and wages became due which he was unable to meet. Patricia Springer then secured $9,000 by placing a mortgage on certain property in Southern California at his request and advanced the money to the corporation. Of this amount $6,865.45 was spent in the payment of wage claims earned prior to February, 1956 and advanced with the full knowledge of the Trustee.

The Trustee made a report to the Court on the proposed plans of re-organization which he submitted on behalf of the creditors but with an adverse report in opposition and was a recommendation that the corporation be adjudicated a bankrupt. His report stated that without taking any appraisal of the property, that the assets of the corporation amounted to $751,104 (R. 50).

An appraiser hired by the corporation gave a valuation of $846,702 to the property.

The hearing was held at Las Vegas, Nevada for the District Court, on the report of the Trustee upon the proposed plan of arrangement, upon the request for attorney fees and other matters.

The notice of hearing merely set out that it was a notice of hearing on the report of the Trustee (R. 43-44) and for allowances for attorneys fees.

No testimony (other than with respect to attorneys' fees) was offered by anyone except by the petitioners who put an appraiser on the stand to testify to valuation, and Patricia Springer to the services rendered and an effort to set forth the amounts of money advanced. Application was made to the court to permit the proposed plans to be submitted to the creditors which application was summarily denied. The court declined to let the appraisers' valuations be filed or even made an offer of proof. Whereupon the District Judge stated he was going to adjudicate the corporation bankrupt and did so and then set aside his order, continuing the matters for future date, because of applications for allowances for trustee and attorneys' fees. Counsel for petitioners and petitioners resided in Los Angeles, California and returned to Los Angeles under the assumption that no action would be taken, in any event, until a future open court hearing date.

On November 7, the judge signed an order denying approval of the proposed plans of arrangement which order was entered by the Clerk but was never served on opposing counsel nor notice sent to them.

Prior to the hearing on November 5 one of counsel filed an application for a trial by jury on the issue of insolvency if the Court was to adjudicate the corporation a bankrupt.

The Court denied the application for a jury trial (R. 120). The Court also denied re-payment to Mrs.

Springer of the $9,000 advanced by her to the Trustee for the benefit of the corporation and which the corporation had used.

He allowed her only $1,500.00 for wages for working for the corporation after the petition for re-organization had been filed. The demand for jury trial was denied (R. 120).

On November 20th (R. 123) the Court reiterated that it rejected the plan of arrangement and demand for jury trial and asserted (erroneously) notice has been given to all those entitled to it (R. 120), he thereupon proceeded to adjudicate the corporation bankrupt and terminate the appointment of the Trustee under re-organization and to appoint a new Trustee in Bankruptcy and to close the motel until further proceedings.

Thereafter, he made allowances of $8,512.90 to the Trustee and $7,050.29 to the attorney for the Trustee.

He disallowed all other claims for attorneys' fees, disallowed any fees for preparing [illegible]posing the plans for arrangement or for any services rendered by the attorney for the corporation to it.

Notice of Appeal duly followed.

After the case reached the United States Court of Appeals for the Ninth Circuit, a motion was made before that Court to remand the case to the District Court for the appointment of an appraiser and for findings of fact and conclusions of law pursuant to Rule 52 Rules of Civil Procedure.

It appears that the judge's determination in respect to all of the matters were summarily made without any findings of fact or conclusions of law or in fact any testimony before the Court except that offered by the petitioners and by attorneys in respect to their attorneys' fees. No findings were made for or against any of these matters and no conclusions of law were entered.

The motion to remand the case for the appointment of an appraiser so that the Court would truly know the value of the property for an adjudication in bankruptcy was based upon the fact that the Trustee's own statements that the assets were of the corporation were valued at $751,104 (R. 50). An appraiser gave one valuation of $846,702 (R. 90) but the Court did not let him testify fully and it was urged upon the Court of Appeals that before the corporation could be adjudicated a bankrupt that the Court should have the fact of its true valuation from appraisers and that the petitioners were entitled to findings of fact and conclusions of law based upon credible evidence so that the Court of Appeals and the Supreme Court could appropriately determine whether bankruptcy was warranted.

The motion to remand was denied.

This petition is being submitted on the original papers pursuant to the provision of Section 250 of the Bankruptcy Act.

The notice of appeal was from all matters prior to the order entered on November 21, 1956 adjudging Aqua a bankrupt and decreeing bankruptcy proceedings be had pursuant to the applicable provisions of the Bankruptcy Act. In the Court of Appeals, the respondent raised the question of the timeliness of the appeal from the order entered on November 7.

The notice of appeal challenged the order of November 7, 1956 in which the District Court disapproved of the re-organization plans submitted by the appellants and denied application for additional time within which to amend these plans. This order was never noticed to the appellants and no notice was ever served on anyone but it was merely entered and filed.

The petitioners contend that their time did not start to run on the appeal until after they had some form of notice thereof and particularly since the hearing on November 20, 1956 reiterated in its order adjudging Aqua a bankrupt, that it had dispproved appellants' plans for reorganization and had denied the application and that the time for appealing from that order did not start to run until at least that date. The notice of appeal was filed December 18, 1956. The Circuit Court of Appeals took the position that it was without jurisdiction to review the order of November 7, 1956 disapproving the re-organization plan. On petition for re-hearing appellants contended that this would constitute a denial of due process guaranteed by the Fifth Amendment to the Constitution of the

United States and that the appeal timely embraced all of the matters originally heard on November 5th through its conclusion. Petition for re-hearing was denied.

QUESTIONS PRESENTED

1. Whether the court erred in refusing the principal stockholders and creditors the right to submit proposed plans of reorganization to the creditors.

2. Whether the proposed plans of re-organization were fair, equitable and feasible.

3. Whether the circuit court erred in holding that it was without jurisdiction to consider the appeals from the order of November 7, 1956 which the court signed without notice to appellants or anyone else in which the court disapproved the reorganization plans submitted by appellants and denied the application for additional time within which to amend these plans. The court on November 20 in court recited its denial of the proposed plan of reorganization in adjudicating the corporation "bankrupt" and decreeing that bankruptcy proceedings be proceeded with. Notice of Appeal was filed December 18, 1956 from all orders. The question is involved as to whether the notice of appeal was timely as to all questions involved, including the disapproval of the plans of reorganization.

4. Whether the notices sent out to creditors, including appellants, that the court would consider a

plan of reorganization or a report on why such a plan cannot be effected (R. 22, 25) was a sufficient notice that the corporation would be adjudicated a bankrupt.

5. Whether before the corporation could be adjudicated a bankrupt it was necessary to hold hearing on whether the corporation is actually "bankrupt," to take evidence, to hear witnesses, to have the property appraised and a fair report as to its actual value and its potential value and earnings, and to make findings of fact and conclusions of law as provided by Rule 52, Rules of Civil Procedure for the District Courts of the United States.

6. Whether the Circuit Court erred in refusing to remand the case to the District Court for the purpose of appointing an appraiser, and to take evidence, make findings of fact and conclusions of law under Rule 52 Rules of Civil Procedure.

7. Whether the District Court erred in adjudicating the corporation a bankrupt; (a) whether the notice was adequate; (b) whether there was any basis without the taking of evidence; (c) whether it was bankrupt even though it may be solvent; (d) whether a corporation whose assets are at least $751,104.44 and its total estimated obligations (secured and unsecured) are estimated at $721,346.85 is in fact "bankrupt."

8. Whether an order to proceed with a hearing on the questoin of whether the corporation should be adjudicated bankrupt entitles it to a trial by jury on the

issue of insolvency, a demand for jury trial having previously been made in writing with the court, and denied. (R. 120).

9. Whether the principal stockholder, who advanced personal funds to the trustee in reorganization to meet hotel operating payrolls and other expenses incurred by the trustee when he had no immediate cash, is entitled to recover those funds, and whether a denial of them to her, was error.

10. Whether the attorneys for the corporation and creditors are entitled to compensation for the work, as applied for, and whether the circuit court erred in holding that appeals from denials of compensation and reimbursement of expenses are not to be considered under the general notice of appeal from the orders but that "appeals from *all* orders making or refusing allowances in such proceedings are governed by Section 250 of the Bankruptcy Act (11 U.S.C.A. Sec. 650).

11. Whether appellants, after filing notice of appeal in the District Court, from the orders of the District Court, must file separate applications to the Circuit Court for leave to appeal from the challenged orders making and refusing to make allowances.

12. Whether the circuit court erred in refusing the appellant's motion to remand the case to the District Court with directions to appoint an appraiser, and to take his and other testimony concerning the actual value of the debtor's property and testimony as to

the fairness and feasibility of the proposed plans of reorganization, and to make findings of fact and conclusions of law thereon.

REASONS FOR GRANTING WRIT

Important questions of bankruptcy law, which have not been, but should be decided by this Honorable Court, are presented by this petition.

The court below has also decided this case contrary to the law and contrary to Rules of Civil Procedure, Rule 52, Requiring findings of fact and conclusions of law to be stated, in bankruptcy, as well as other matters.

The corporate property, of which the petitioners Springer and Cashen were the principal stockholders, hit the Las Vegas slump (see Life magazine) and ran into difficulties because of it. But it possessed a new hotel, fully furnished with television and radio in each room, new equipment, and four and a half acres of land on the "strip"—a swimming pool, and other complete facilities. Reorganization therefore was fully possible. Nevertheless, the trustee came up with no new plan, no reorganization of the stock structure, and nothing to bail out the tentative financial stringency. It would seem that with such wonderful assets a plan to get fresh money from the sale of $1 stock was easily feasible, especially with the gambling fraternity or elsewhere. The trustee and trial court treated the corporation solely as headed for bankruptcy, and that

all that was necessary was to go through the preliminary motions of holding a hearing on why a plan of reorganization cannot be accepted. The court refused to let petitioners go to the creditors with the plan, a requirement in Chapter X before consents can be solicited; then proceeded to deny jury trial and to adjudicate the corporation bankrupt.

When the trustee in reorganization failed to come up with a plan of reorganization, the creditors John Cashen and Patricia Springer came up with proposals. The corporation's attorney joined.

The trustee made a report in which he set forth the assets of the corporation to be $751,104.44. Earlier, the trustee reported that the grand total of liabilities was $456,022.79 (R. 9). At the reorganization hearing he estimated the total obligations to be $721,346.85. No appraisal was made by him.

Petitioners put an appraiser on the stand, who gave the valuation of the property at $846,702 (R. 90), but his valuations and his report were not admitted in evidence.

The notice of the hearing merely set the time for the hearing on the report of the trustee and application for fees (R. 43, 49).

At the hearing on November 5, 1956 the court took no testimony, except that of petitioners with reference to the advances of Mrs. Cashen (Patricia Springer) as to the amount of money she had advanced to the

corporation and her work, and discarded in effect the testimony of petitioner's appraiser; then stated he would adjudicate the corporation bankrupt; then denied application for trial by jury as to the question of insolvency or bankruptcy (R. 120), then he set aside his order or adjudication of bankruptcy and continued the matter to November 20. He also denied approval of the proposed plans of reorganization, denied leave to amend the same to cover some minor matters, denied leave to submit the plans to creditors. On November 7, without notice to anyone or previous service of proposed order, the court signed written orders denying the approval of reorganizations sought after. Such procedure without notice or opportunity to be heard denied petitioners due process of law guaranteed by the Fifth Amendment U. S. Constitution, and contrary to the rules of Civil Procedure and the general practice of law requiring service of proposed judgments and orders on the opposite party before being entered and to become final.

Appeal time therefore did not start to run at least until November 20 when the court first notified opposing counsel in the hearing at which he adjudicated the corporation bankrupt that he had denied approval of the proposed plans of reorganization.

The purpose of the requirement that Finding of Fact be filed by the trial court is to enable the reviewing court to determine the grounds on which the lower court reached its conclusions.

Continental-Illinois National Bank & Trust Co. v. Ehrhart, 127 Fed. (2d) 341.

In *Kelley v. Everglades Drainage District*, 319 U.S. 415, the Supreme Court of the United States reversed a case where there had been no Findings of Fact made as required by the Rules, stating as follows:

"Petitioners contend here, as they did in both courts below, that the plan discriminates unfairly in favor of the Class II creditors. But we are unable to reach that question since we agree with petitioners that the record lacks the findings of fact which the statute and the General Orders in Bankruptcy require, and which are necessary to the determination of that question.

"Section 83(e) of the Act requires that 'At the conclusion of the hearing, the judge shall make written findings of fact and his conclusions of law thereon.' And Rule 52(a) of the Rules of Civil Procedure, made applicable to bankruptcy cases by General Order in Bankruptcy No. 37, requires the court to 'find the facts specially.' In *Consolidated Rock Products Co. v. DuBois*, 312 U.S. 510, 520-525, 85 L.ed. 982, 990-993, 61 S. Ct. 675, 45 Am. Bank. Rep. (NS) 79, this Court held that in the absence of findings as to the value of the assets subject to the payment of the respective claims of each class of bondholders, the courts were in no position to exercise the 'informed, independent judgment' necessary to the discharge of their statutory duty to determine the fairness of a plan of corporate reorganization under the old §77B

of the Bankruptcy Act, 11 USCA §207. In *Ecker v. Western P. R. Corp.*, Nos. 7, 8, 20, 33, and 61 [318 US 448, ante, 892, 63 S.Ct. 692, 52 Am. Bankr. Rep. (NS) 469], and in *Group of Institutional Investors v. Chicago, M. St. P. & P. R. Co.*, Nos. 11-19, 32, decided March 15, 1943 [318 US 523, ante, 959, 63 S.Ct. 727, 52 Am. Bankr. Rep. (NS) 526], we hold the requirement of adequate findings applicable to railroad reorganizations under §77 of the Bankruptcy Act, 11 USCA §205, 3 FCA Title 11, §205."

Without findings of fact and without an opportunity to attack the findings of fact and conclusions of law denied to the appellants due process of law guaranteed by the Fifth Amendment to the Constitution of the United States, which provides as follows:

> "No person shall . . . be deprived of life, liberty or property without due process of law."

In the words of Webster so often quoted, that "By the law of land is intended the law which hears before it condemns" have been repeated in various forms of expression in a multitude of decisions.

Powell v. Alabama, 287 U.S. 68, 77 L.Ed. 170.

Without an appraisal regarding the value of this property and without findings of fact and conclusions of law, appellants have been deprived of due process of law and the case should be remanded to the District Court for the appointment of an appraiser and to the

taking of the testimony of the actual value of the property and Findings of Fact based upon actual evidence.

Important questions of bankruptcy law which have not been passed upon by this court are thus involved and certiorari should be granted.

As the petitioners are financially strapped leave is asked of this court to proceed upon the original record and papers, as provided in Section 250 of the Bankruptcy Act.

Respectfully submitted,

AQUA HOTEL CORPORATION
PATRICIA SPRINGER,
Creditor
JOHN H. CASHEN,
Creditor
Petitioners.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Dec. 17, 1957

In the Matter of)
AQUA HOTEL CORPORATION,) No. 15,439
Bankrupt.)

Appeal from the United States District Court for the District of Nevada

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OPINION

Before: Fee, Barnes and Hamley, Circuit Judges.

HAMLEY, Circuit Judge:

This proceeding was instituted under Chapter X of the Bankruptcy Act, 11 U.S.C.A. §501 et seq., to obtain reorganization of Aqua Hotel Corporation. Following disapproval of two proposed reorganization plans, the court adjudicated the corporation a bankrupt, and converted the proceedings from reorganization to bankruptcy.

The corporation and its principal stockholders, John F. Cashen and his former wife, Mrs. Patricia Cashen Springer, president and treasurer, respectively,

of the corporation, appeal. Thomas J. McLaughlin, trustee of the corporation in the reorganization proceedings, appeared as appellee. Sydney H. Kaye, who became trustee in the bankruptcy proceedings, and Ralph J. Weiler, a creditor, applied for and obtained permission to intervene and defend against the appeal.

On August 1, 1955, Aqua Hotel Corporation (Aqua) began operating a hotel in Las Vegas, Nevada. Business did not come up to expectations, and the company soon found itself unable to pay its debts as they matured. The company therefore filed a petition in the district court, asking that corporate reorganization proceedings be had. The petition was filed on February 14, 1956, at a time when no bankruptcy proceeding involved the corporation was pending.

On February 16, 1956, an order was entered approving the petition and appointing a trustee. McLaughlin, who was named to this post, was authorized to take possession of the assets and property, and to carry on the business until further order of the court. The trustee was further directed to prepare and file, on or before May 11, 1956, a plan of reorganization or a report of his reasons why a plan could not be effected.

The time within which the trustee's report should be filed was thereafter extended to June 11, 1956. This same time limitation was set for the filing of proposed plans of reorganization by any other interested persons. The trustee's report was filed on that date, the position being taken that a plan of reorganization could

not be effected. The court then extended the time for the filing of proposed plans by other interested persons to September 17, 1956. A further extension to October 4, 1956, was later authorized. Both of these extensions were granted upon the request of appellants.

On September 29, 1956, two proposed plans of reorganization were filed, one by Cashen and Mrs. Springer, and the other by Mrs. Springer. In a report filed on October 3, 1956, the trustee estimated the obligations of the corporation to be $721,346.85, and its assets to be $751,104.44. The latter figure was based upon the trustee's examination of books, records, and documents, no appraisal having been made.

The trustee reviewed the operations of the business under his management, indicating that there had been neither loss nor profit, and that it could continue to break even if outstandnig obligations were disregarded. In this report, the trustee expressed the opinion that the plans proposed by Cashen and Mrs. Springer were not fair, equitable, or feasible. He, in effect, renewed his statement of June 11, 1956, that no acceptable plan of reorganization could be effected.

An order was entered setting for hearing on November 5, 1956, the trustee's report and the proposed plans of reorganization. A further question ordered to be considered at this hearing was whether, pursuant to §236(2) of the Bankruptcy Act, 11 U.S.C.A. §636 (2), debtor should be adjudged a bankrupt and bank-

ruptcy proceeding be ordered, or, in the alternative, whether the reorganization proceedings should be dismissed.

Following the hearing on November 5, 1956, an order was entered disapproving the proposed plans of reorganization submitted by Cashen and Mrs. Springer. Applications for allowances of compensation and reimbursement of expenses incurred in the proceedings were ordered to be filed by November 15, 1956. A hearing to consider these applications was set for November 20, 1956. The court took under advisement until that time the question of whether Aqua should be adjudicated a bankrupt.

As a result of the hearing held on November 20, 1956, an order was entered on November 21, 1956, adjudging Aqua a bankrupt and decreeing that bankruptcy proceedings be had pursuant to the applicable provisions of the Bankruptcy Act. The hearing on the applications for allowances was continued to December 4, 1956.

Following a hearing on December 4 and 5, 1956, an order was entered on December 17, 1956, making and denying allowances. On the latter date, another order was also entered, terminating forthwith operation of the hotel business. The proceedings were transferred to the referee in bankruptcy. McLaughlin was authorized to continue as trustee in reorganization until the appointment and qualification of a trustee in bankruptcy. The assets and property of the debtor were

then to be turned over to the duly qualified and acting trustee in bankruptcy.

On the following day, Aqua, Cashen, and Mrs. Springer filed a notice of appeal. On December 21, 1956, Aqua filed an amended notice of appeal. On January 4, 1957, the referee appointed Sydney H. Kaye as trustee in bankruptcy. He then came into possession of all of the assets of the debtor.

Appellants Cashen and Mrs. Springer have moved in this court to substitute Kaye, trustee in bankruptcy, as appellee in place of McLaughlin, trustee in reorganization, and to strike McLaughlin's brief.

Under the terms of the December 17, 1956, order, McLaughlin became *functus officio* as soon as Kaye qualified as trustee in bankruptcy and received from McLaughlin the assets and property of the debtor. Kaye is now the only authorized representative of the creditors. McLaughlin has no interest to protect aside from the personal one of avoiding resumption of his duties as trustee in reorganization, in the event appellants prevail. If he wished to avoid this, he can decline to serve. The motion is therefore granted.

Appellants Cashen and Mrs. Springer have also moved to disqualify Charles L. Garner as attorney for Kaye, and to strike the brief prepared and filed by Garner on behalf of Kaye. The motion was made on the ground that Garner had previously acted as attorney for appellant Mrs. Springer in these proceedings,

and was and is in a confidential relationship with her concerning this case.

Affidavits filed in connection with this motion indicate that, as an accommodation to one of Mrs. Springer's regular attorneys, from whom Garner subleases office space, Garner appeared for Mrs. Springer in two hearings, and performed other minor services in her behalf. Garner received no compensation for these services, did not come into possession of confidential information, and did not provide Mrs. Springer legal advice.

While there was here no breach of a confidential relationship, Garner was ill-advised in representing Kaye after having performed the indicated services for Mrs. Springer. The breach of a confidential relationship between attorney and client is a matter of such seriousness that any appearance of such a breach is to be avoided. Under the circumstances, however, we do not feel warranted in disqualifying Garner as attorney for Kaye. This motion is therefore denied.

Under their first specification of error, appellants argue that the assets of Aqua exceeded its liabilities, that Aqua was therefore not insolvent, and that a corporation involved in reorganization proceedings, which is not insolvent, may not be adjudged a bankrupt.

A person is insolvent, within the meaning of §1 (19) of the Bankruptcy Act, 11 U.S.C.A. §1 (19), whenever the aggregate of his property shall not, at a fair valua-

tion, be sufficient in amount to pay his debts. The court made no finding as to whether Aqua is insolvent, within the meaning of this statute.

The adjudication of Aqua's bankruptcy, however, was not made under the general provisions of the Bankruptcy Act, with regard to which §1 (19) governs.[1] The adjudication here was made under Chapter X of the act, pertaining to corporate reorganizations. The particular statutory provision which the court applied is §236 of the act, 11 U.S.C.A. §636, the applicable part of which is quoted in the margin.[2]

Aqua was unable to pay its debts as they matured, as the corporation itself alleged in its position seeking corporate reorganization. The only reorganization plans thereafter proposed were disapproved by the court. The court also denied further time for the amendment of such plans or the proposal of any other plans.

The existence of these circumstances authorized the court, proceeding under §236 (2), to enter an order

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[1]Even under the general provisions of the act, insolvency is not always an essential element. See §3 (a) of the Bankruptcy Act, 11 U.S.C.A. §21 (a); 6 Collier on Bankruptcy (14th ed. 1947) 4255, §12.03.

[2]"§636. Failure to effectuate plan or consummation. If no plan is proposed within the time fixed or extended by the judge, or if no plan proposed is approved by the judge and no further time is granted for the proposal of a plan, or if no plan approved by the judge is accepted within the time fixed or extended by the judge, or if confirmation of the plan is refused, or if a confirmed plan is not consummated, the judge shall—

"(2) where the petition was filed under section 528 of this title, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this title, or dismissing the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders."

adjudging Aqua a bankrupt, and directing that bankruptcy be proceeded with. There is no provision in this statute, as there was under former §77B (c) (8), expressly excepting a solvent debtor from adjudication. The fact that such an exception was deleted in the enactment of §236 is a clear indication that insolvency, in the §1 (19) sense, was no longer to be an essential element in adjudicating bankruptcy in reorganization proceedings.[3]

We therefore hold that the court did not err in adjudicating Aqua a bankrupt without first finding that it was insolvent, as that term is defined in §1 (19) of the Bankruptcy Act.

Under their second specification of error, appellants contend that the court erred in denying the right to a trial by jury on the question of insolvency.

There was no trial on that question, nor, as we have seen, any need of one. Hence, there was no occasion to call a jury to determine such a question.

Under another specification of error, appellants challenge the order of November 7, 1956, in which the court disapproved the reorganization plans submitted by appellants, and denied the application for additional time within which to amend these plans.

Kaye contends that this court is without jurisdiction to review the order of November 7, 1956, because

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[3]See 6 Collier on Bankruptcy, supra, 4255, ¶12.03, expressing the same view and quoting the confirmatory statement of the draftsmen of Chapter X. To the same effect, see *In re Dollar Dry Cleaning Co., Inc.* (D.Conn.), 35 F. Supp. 861. *Contra: John Hancock Mutual Life Ins. Co. v. Casey* (1 Cir.), 141 F. (2d) 104, cert. den. 323 U. S. 713.

the notice of appeal was not filed within thirty days of that date.

It is provided in §25 (a) of the Bankruptcy Act, 11 U.S.C.A. §48 (a), that appeals under that act shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order, or decree complained of, proof of such notice to be filed within five days after service. This section further provides that, if such notice be not served and filed, an appeal shall be taken within forty days from the entry of such judgment, order, or decree.

No notice of entry of the order of November 7, 1956, was served and filed. Appellants therefore had forty days, or until December 17, 1956, within which to appeal from that order. The original notice of appeal was filed on December 18, 1956. We are therefore without jurisdiction to review the order of November 7, 1956.

Under another specification of error, appellants argue that the court erred in denying the right to a trial by jury on the issue of whether the proposed plans of reorganization are fair, equitable, and feasible.

Since we are without jurisdiction to review that order, the asserted error in denying a jury trial with regard to the issues therein determined is not before us. In any event, examination of the record indicates that no demand was made for a jury trial on the issue

of whether the proposed plans of reorganization are fair, equitable, and feasible.

Under the remaining specifications of error, appellants question the refusal to allow the claim of appellant Mrs. Springer for repayment of monies alleged to have been advanced by her; the refusal to allow the claim of the debtor's attorney for services rendered on behalf of the corporation during the reorganization proceedings; and the amount of the fees allowed the trustee in reorganization and the latter's attorney.

Appeals from all orders making or refusing to make allowances in such proceedings are governed by §250 of the Bankruptcy Act, 11 U.S.C.A. §650. In *Dickinson Co. v. Cowan*, 309 U.S. 382, 385, it was held that appeals from such orders, under this section, may be had only at the discretion of the court of appeals. The proper procedure is to file in the court of appeals, within the time prescribed in §25 (a) of the Bankruptcy Act, 11 U.S.C.A. §48 (a), an application for leave to appeal. *Reconstruction Finance Corporation v. Prudence Securities Advisory Group*, 311 U. S. 579.

It is indicated in the case last cited that failure to follow such procedure is not jurisdictional. It is an irregularity which the court of appeals has discretion to disregard in the interests of substantial justice, where the scope of review is not affected. Thus, while a court of appeals normally "would be wholly justified in treating the mere filing of a notice of appeal in the

District Court as insufficient," it may overlook this irregularity to avoid an "extremely harsh" result in a particular case. *Reconstruction Finance Corporation v. Prudence Securities Advisory Group, supra,* 582.[4]

Appellants have not applied to this court for leave to appeal from the challenged order making and refusing to make allowances. Examination of the record fails to disclose any patent error with regard to allowances, or to indicate that an extremely harsh result would follow refusal to review this order. We therefore decline to review the order relating to allowances.

Appellants have moved the court for an order remanding this cause to the district court with directions to appoint an appraiser, and to take his and other testimony concerning the actual value of the debtor's property and testimony as to the fairness and feasibility of the proposed plans of reorganization, and to make findings of fact and conclusions of law thereon. The motion is denied.

The judgment is affirmed.

(Endorsed:) Opinion. Filed Dec. 17, 1957.
Paul P. O'Brien, Clerk.

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[4]See, also, *Ross v. Drybrough* (2 Cir.), 152 F. (2d) 427; *Cohen v. Casey* (1 Cir.), 152 F. (2d) 610, 611. As stated in the latter case: ". . . It is in the contemplation of §250 of the Bankruptcy Act that appeals relating to allowance or disallowance of fees shall be expeditiously and summarily disposed of upon the original papers. . . ."